



**FINAL DETERMINATION**

**IN THE MATTER OF**

**JO CIAVAGLIA AND THE BUCKS  
COUNTY COURIER TIMES,  
Requester**

**v.**

**LOWER SOUTHAMPTON TOWNSHIP,  
Respondent**

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**Docket No: AP 2019-1999**

**INTRODUCTION**

Jo Ciavaglia, a reporter for the Bucks County Courier Times (collectively, the “Requester”), submitted a request (“Request”) to Lower Southampton Township (“Township”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking records related to property line changes within the Township from 2018 to present. The Township denied the Request, arguing requested records are protected from public disclosure by the Uniform Construction Code (“UCC”). The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted**, and the Township is required to take additional action as directed.

## **FACTUAL BACKGROUND**

On September 11, 2019, the Request was filed, seeking “documents that show all applications for lot line changes in the calendar years of 2018 to YTD. Those documents should include all receipts showing the fees charged and paid.” On September 13, 2019, the Township invoked a thirty-day extension to respond. 65 P.S. § 67.902(b). On October 8, 2019, the Township denied the Request, arguing that the requested records are not public records and are exempt under the UCC, 64 Pa. Code § 403.85(e) and 34 Pa. Code § 403.1.

On October 24, 2019, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the Township to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On November 6, 2019, the Township submitted a position statement reiterating its argument that the requested records are not public and the Township is prohibited from disclosing the records. In support of its position, the Township submitted the affidavit of William Oettinger, Open Records Officer and Zoning Officer of the Township.<sup>1</sup>

## **LEGAL ANALYSIS**

“The objective of the Right to Know Law ... is to empower citizens by affording them access to information concerning the activities of their government.” *SWB Yankees L.L.C. v. Wintermantel*, 45 A.3d 1029, 1041 (Pa. 2012). Further, this important open-government law is “designed to promote access to official government information in order to prohibit secrets,

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<sup>1</sup> On December 5, 2019, the Requester provided the OOR with a supplemental submission. However, as the submission was made after the record had closed, it was not considered for purposes of this appeal. *See* 65 P.S. § 67.1102(b)(3) (“In the absence of a regulation, policy or procedure governing appeals under this chapter, the appeals officer shall rule on procedural matters on the basis of justice, fairness and the expeditious resolution of the dispute”).

scrutinize the actions of public officials and make public officials accountable for their actions.” *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff’d* 75 A.3d 453 (Pa. 2013).

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required “to review all information filed relating to the request” and may consider testimony, evidence and documents that are reasonably probative and relevant to the matter at issue. 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The law also states that an appeals officer may admit into evidence testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute. *Id.* The decision to hold a hearing is discretionary and non-appealable. *Id.*; *Giurintano v. Pa. Dep’t of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct. 2011). Here, the parties did not request a hearing; therefore, the OOR has the necessary information and evidence before it to properly adjudicate the matter.

The Township is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in possession of a local agency are presumed public unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. Upon receipt of a request, an agency is required to assess whether a record requested is within its possession, custody or control and respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemptions. *See* 65 P.S. § 67.708(b).

Section 708 of the RTKL places the burden of proof on the public body to demonstrate that a record is exempt. In pertinent part, Section 708(a) states: “(1) The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the

Commonwealth agency or local agency receiving a request by a preponderance of the evidence.” 65 P.S. § 67.708(a)(1). The burden of proof in claiming a privilege is on the party asserting that privilege. *Levy v. Senate of Pa.*, 34 A.3d 243, 249 (Pa. Commw. Ct. 2011). Preponderance of the evidence has been defined as “such proof as leads the fact-finder ... to find that the existence of a contested fact is more probable than its nonexistence.” *Pa. State Troopers Ass’n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011) (quoting *Pa. Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)). Likewise, “[t]he burden of proving a record does not exist ... is placed on the agency responding to the right-to-know request.” *Hodges v. Pa. Dep’t of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

The Township submitted a position statement indicating that the Township believes the UCC prohibits public dissemination of subdivision applications. In support of that belief, Mr. Oettinger attests, in pertinent part, as follows:

3. The Township does not maintain any documents known as “lot line change applications.”
4. Rather, if an individual seeks to apply for a lot line change, such a request would be made by way of a minor subdivision application.
5. The Township maintains a list of all minor subdivision application that have been filed within a calendar year. However, the Township does not keep any central data base or other searchable list regarding subdivision application to determine those requesting lot line changes.
6. As a result, the Township does not have any records specifically delineating lot line change requests over the period of time requested by Requester and would need to manually examine each and every minor subdivision application to determine those requesting lot line changes.
7. Moreover, pursuant to the duties imposed upon the Township by the Pennsylvania Uniform Construction Code, it is the Township’s belief that the State Legislature prohibits the Township from disclosing any such records related to construction applications, even if the Township maintained a list of such records.

Under the RTKL, a sworn affidavit or statement made under penalty of perjury may serve as sufficient evidentiary support for the nonexistence of records. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In the absence of any competent evidence that the Township acted in bad faith, “the averments in [the affidavit] should be accepted as true.” *McGowan v. Pa. Dep’t of Env’tl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)).

Here, the Township argues that the UCC applies to the requested records because it requires a request for a lot line change to be in the form of a minor subdivision application. The OOR has found certain building records to be confidential under Section 403.85(e) of the UCC, which states that “... a municipality ... may prohibit the release of applications received, building plans and specifications, inspection reports and similar documents under the [RTKL].” 34 Pa. Code § 403.85(e); *see also Pohlman v. Middle Smithfield Twp.*, OOR Dkt. AP 2011-0660, 2011 PA O.O.R.D. LEXIS 457. Pursuant to Section 102 of the RTKL, any record that is “exempt from being disclosed under any Federal or State law or regulation” is not a public record. 65 P.S. § 67.102; *see also* 65 P.S. § 67.3101.1 (“If the provisions of t[he RTKL] regarding access to records conflict with any other federal or state law, the provisions of t[he RTKL] shall not apply”).

However, the UCC applies to, “the construction, alteration, repair, movement, equipment, removal, demolition, location, maintenance, occupancy or change of occupancy of every *building or structure* which occurs on or after April 9, 2004, and all existing structures that are not legally occupied.” 64 Pa. Code § 403.1 (emphasis added). The UCC defines buildings and structures as follows:

Building -- A structure used or intended for supporting or sheltering any occupancy.

Structure -- A combination of materials that are built or constructed with a permanent location or attached to something that has a permanent location.

64 Pa. Code § 401.1.

The Request in the present case does not seek information regarding a building or structure, but instead seeks records of applications for lot line changes and the associated financial documentation that may accompany those changes. The Township has acknowledged that it does not utilize a specific form for such a change; instead, the landowner submits a minor subdivision application and indicates on that form any request for a lot line change. Therefore, because the requested records do not relate to a building or structure subject to the UCC, the Township has failed to prove that the records may be withheld thereunder. 65 P.S. § 67.305; *see also Smith v. Town of Bloomsburg*, OOR Dkt. AP 2018-1596, 2018 PA O.O.R.D. LEXIS 1357 (a request including “subdivision submissions and approvals” was not prohibited from disclosure under the UCC, however architectural and engineering drawings were deemed confidential).

The Township also argues that to satisfy the Request, the Township would be forced to undertake a time-consuming review of its records to determine which records are responsive to the Request and which are non-responsive. The Commonwealth Court has noted that the RTKL:

...permits a [requester] to request and obtain public records, subject to claims of exemption. A [requester] cannot control how an agency catalogues or organizes such files. As such, an agency’s failure to maintain the files in a way necessary to meet its obligations under the RTKL should not be held against the requester. To so hold would permit an agency to avoid its obligations under the RTKL simply by failing to orderly maintain its records.

*Pa. Dep’t of Env’tl. Prot. v. Legere*, 50 A.3d 260, 265 (Pa. Commw. Ct. 2012). Here, it is clear that the Township understands what the Request seeks. Further, conducting a search of the Township’s files to determine which minor subdivision applications are and are not responsive does not require any judgments to be made; that is, each application either does or does not involve

a lot line change. Such a search is required under the RTKL in order to satisfy a good faith search. 65 P.S. 67.901; *Uniontown Newspapers, Inc. v. Pa. Dep't of Corr.*, 185 A.3d 1161 (Pa. Commw. Ct. 2018); *but see* 65 P.S. § 67.703 (“A written request should identify or describe the records sought with sufficient specificity to enable the agency to ascertain which records are being requested...”). The fact that the Township has organized its files in a way that does not make the search as convenient as it might otherwise be, does not excuse the Township from its obligation to search the records and identify those that are responsive to the Request.

### CONCLUSION

For the foregoing reasons, the appeal is **granted**, and the Township is required to provide responsive records within thirty days. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Bucks County Court of Common Pleas. 65 P.S. § 67.1302(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to respond as per Section 1303 of the RTKL. 65 P.S. § 67.1303. However, as the quasi-judicial tribunal adjudicating this matter, the OOR is not a proper party to any appeal and should not be named as a party.<sup>2</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: December 5, 2019**

/s/ Ryan W. Liggitt

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RYAN W. LIGGITT, ESQ.  
APPEALS OFFICER

Sent to: Jo Ciavaglia (via email only);  
William Oettinger, AORO (via email only);  
Tamara Wang (via email only)

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<sup>2</sup> *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).